Supreme Court, U.S.
FILED

091316 APR 26 2010

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No. _____

In The
Supreme Court of the United States

TRACY BROWN,
Petitioner

v.

JEFFREY MARK OLSON,
Respondent

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a claim for injunctive relief become moot and subject to dismissal under Article III, §2 of the United States Constitution when a putative class representative loses his personal stake after filing a complaint but before class certification where the claims of the putative class typically endure for one hundred thirty-nine (139) days and, not uncommonly, over a year notwithstanding uncertainty at the time the claim is filed as to when the claim of any particular class member might expire, or is the claim saved as "inherently transitory" under *Gerstein v. Pugh*, 420 U.S. 103 (1975) and its progeny?

LIST OF PARTIES

The parties to the proceeding below were defendant/petitioner Tracy Brown, in his official capacity as Sheriff of Tippecanoe County, Indiana, and plaintiff/respondent Jeffrey Olson, on behalf of himself and a class of those similarly situated.

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Petitioner Tracy Brown, Sheriff of Tippecanoe County, Indiana, respectfully petitions for a writ of certiorari to review the opinion and decision of the United States Circuit Court for the Seventh Circuit filed on February 4, 2010.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit reversed the decision of the United States District Court for the Northern District of Indiana dismissing Respondent's claim as moot. The Seventh Circuit's opinion is reported at 594 F.3d 577 (7th Cir. 2010) and is reprinted in the appendix hereto at App. 1. The district court's order dismissing Respondent's claim as moot is available at 2009 WL 1766667 (N.D. Ind. 2009) and is reprinted in the appendix hereto at App. 14.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit for which Petitioner seeks review was issued February 4, 2010. This petition was timely filed within 90 days of the February 4, 2010 decision. The jurisdiction of this Court to review the decision of the Court of Appeals is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Art. III, §2 provides in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this

> Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

Respondent Jeffrey Mark Olson was a prisoner of the Indiana Department of Correction who was being held at the Tippecanoe County Jail for the 139 day period between August 29, 2008 and January 15, 2009. Petitioner Tracy Brown is the Sheriff of Tippecanoe County, Indiana and is responsible for the conditions at the Tippecanoe County Jail.

On January 2, 2009, while still incarcerated at the Tippecanoe County Jail, Mr. Olson filed his complaint seeking only injunctive relief with respect to alleged policies and practices at the Tippecanoe County Jail that, according to him, violated his rights under the United States Constitution and Indiana state law. With his Complaint, Mr. Olson filed a motion for certification of a class consisting of current and future persons incarcerated at the Tippecanoe County Jail. At a given time, the jail population consists of

approximately 529 inmates with an average stay of 139 days. On February 20, 2009, 128 of the inmates had been in the jail for less than 30 days; 119 had been in the jail for between 30 and 90 days; 130 had been in the jail for between 90 and 180 days; 121 had been in the jail for between 180 and 365 days; and 41 had been in the jail for over a year. The parties agreed that this jail population was a representative sample.

On January 15, 2009, the Indiana Department of Correction transferred Mr. Olson out of the Tippecanoe County Jail. On March 13, 2009, Sheriff Brown filed a motion to dismiss under Rule 12(c) of the Rules of Federal Procedure. On March 18, 2009, the district court heard oral argument on the motion for class certification but deferred ruling pending Mr. Olson's response to the motion to dismiss. On June 23, 2009, the district court dismissed Mr. Olson's claim as moot because Mr. Olson lost his personal stake in the litigation prior to class certification and determined that the putative class claim asserted by Mr. Olson was not inherently transitory such that class certification, if granted, would "relate back" to the filing of the Complaint.

Mr. Olson's complaint alleged four basic violations of his rights at the jail: 1) An inadequate grievance process in violation of Indiana law; 2) Inadequate access to a law library in violation of Indiana law; 3) Inspection of his mail from the courts outside of his presence in violation of the First and Fourteenth Amendments to the United States Constitution and Indiana law; and 4) Inspection of his mail from attorneys outside of his presence in violation of the First and Fourteenth Amendments to the United States Constitution and Indiana law. Originally filed in the Tippecanoe Superior

Court 1, the case was removed to the United States District Court for the Northern District of Indiana pursuant to 28 USC 1441 and 1446. The District Court had original jurisdiction of the case under 28 USC 1331 for federal claims that the Sheriff of Tippecanoe County violated Mr. Olson's rights under the First and Fourteenth Amendments to the United States Constitution, actionable under 42 USC 1983. The district court had supplemental jurisdiction of the state law claims under 28 USC 1367.

On appeal, the United States District Court for the Seventh Circuit had jurisdiction under 28 USC 1291. The judgment of June 23, 2009 in the district court disposed of all the issues in the case. Mr. Olson filed his notice of appeal on July 7, 2009. On February 4, 2010, the Seventh Circuit reversed the district court and remanded for consideration of Mr. Olson's motion for class certification and for consideration of Sheriff Brown's motion to dismiss. The Circuit Court's reversal was based on its determination that Mr. Olson's claim was inherently transitory and, therefore, entitled to the exception to the mootness doctrine applied in *Gerstein v. Pugh*, 420 U.S. 103 (1975). The Seventh Circuit reasoned Mr. Olson's claim was "inherently transitory" within the meaning of *Gerstein* because of uncertainty for Mr. Olson or any other inmate about how long his or her particular claim would remain viable, because a named plaintiff's claim might expire before a district court judge has an opportunity to rule on a motion for class certification, and because there is a constant set of inmates subject to the conditions alleged. *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010) (App. 9) ("While the ultimate length of confinement does affect the applicability of the 'inherently transitory' exception, the essence of the exception is

uncertainty about whether a claim will remain alive for any given plaintiff long enough for a district court to certify the class.")

REASONS TO GRANT THE PETITION

I. The Seventh Circuit's decision expands the "inherently transitory" mootness exception to include claims which are only potentially transitory.

The proper scope of federal jurisdiction is a matter of fundamental importance. The Seventh Circuit's decision expands the authority of a federal court to entertain moot cases beyond what has been previously recognized by the Supreme Court. Furthermore, the Circuit Courts have not been uniform in their application of the "inherently transitory" exception to mootness for putative class actions that have not been certified. The case at hand presents relatively simple and uncontested facts which will allow the Court to squarely address the proper bounds of the exception.

Article III, §2 of the United States Constitution limits the jurisdiction of the federal courts to actual cases or controversies. *Liner v. Jafco*, 375 U.S. 301, 306 fn. 3 (1964). Additionally, the Supreme Court has recognized a prudential doctrine of mootness which limits a court's authority to maintain jurisdiction over a case in which the controversy is no longer "live." *See Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J. concurring). As a practical matter, in claims for injunctive relief, this means that a plaintiff cannot seek to enjoin practices or procedures to which the plaintiff is no

longer subject. *Alvarez v. Smith*, __ U.S. ___; 130 S.Ct. 576, 580-581 (2009).

The Supreme Court has carved out a narrow exception for claims that are of such a limited duration that strict application of mootness principles would allow the claims to escape review entirely. In the class action context, this means claims so transitory they will expire before a district court has a reasonable opportunity to rule on class certification; claims that are "inherently transitory." *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991).

The Seventh Circuit's ruling in this case, however, expands the exception beyond *inherently* transitory claims to those which are *potentially* transitory. Rather than examining generically the duration of the type of class claim asserted by the plaintiff, the Seventh Circuit focused on the uncertainty faced by any particular claimant at the outset. The facts of this case are relatively simple. On average, an inmate is subject to the policies and practices at the Tippecanoe County Jail for 139 days, and 30% of the inmate population is subject to those policies and procedures for over six months. Forty-one inmates had been in jail for over a year. It is not unreasonable to expect that a district court could rule on a motion for class certification within such time periods. Even if some inmates might be in the jail for shorter durations and unable to obtain class certification prior to his or her case becoming moot, the claim by its inherent nature is not one likely to escape review entirely.

Under the Seventh Circuit's ruling, mere uncertainty of duration at the outset of a particular claim is sufficient to avoid mootness even where, as here, a non-trivial number of

potential claimants have claims that last in excess of a year. The exception swallows the rule. The ruling is contrary to Supreme Court precedent and adds to conflict between the Circuits.

> *II. Unlike the Seventh Circuit, this Court has not recognized uncertainty of a claim's duration at the inception of a particular claimant's lawsuit as the essence of the "inherently transitory" mootness exception. Rather, it is the nature of the class claim generally which must be transitory to qualify for the exception.*

The Seventh Circuit's expansion of the "inherently transitory" exception to mootness goes beyond the scope recognized by this Court. The Court has recognized as "inherently transitory" claims with durations measured in terms of days and weeks, not those which can last for months or even years. The exception was suggested in *Sosna v. Iowa*, 419 U.S. 393 (1974). In that case, the plaintiff was challenging an Iowa statute that required one year's residency in the state before initiating divorce proceedings. The plaintiff, through passage of time, had lost her personal stake after certification of the class, but the Court recognized that, upon certification, the class acquired a legal status of its own. *Id.* at 399. However, the Court went on to recognize the possibility that class certification could be deemed to "relate back" to the filing of the complaint where the claim becomes moot as to the class representative before a district court can reasonably be expected to rule on the motion for class certification and where the issue raised by the claim would otherwise evade review. *Id.* at 402.

In the case of *Gerstein v. Pugh*, this Court applied, at least hypothetically, the relation back suggested by *Sosna* in the context of a class of Florida prisoners claiming a constitutional right to a judicial hearing on the issue of probable cause for pretrial detention. Under the Florida scheme, individuals could be incarcerated on a prosecutor's information without any kind of judicial hearing for approximately a month before any sort of judicial hearing. 420 U.S. at 106. The application was possibly hypothetical because the Court stated that the record did not reflect whether or not any of the named plaintiffs retained a personal stake in the litigation until the time of class certification. Even assuming they did not, however, the Court said the case would be a suitable exception to the requirement that a named plaintiff retain a personal stake until class certification because it was uncertain if any individual would remain in custody long enough for a district court judge to certify a class and there was a constant class of individuals suffering the deprivation. *Id.* at 111, fn. 11.

The Court has not expanded the exception since the *Gerstein* case. In a similar pretrial detention case, *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), relation back of an inherently transitory claim was deemed appropriate for prisoners held up to seven days without a probable cause determination. The Court also noted the applicability of the "inherently transitory" exception in a case involving Double Jeopardy questions about a Maryland procedure for juvenile proceedings. Under the procedures, the juveniles' case would initially be heard by a master. However, within a period of 30 days, the possibility existed for a trial court to take action against the juvenile which was contrary to and less favorable than the action recommended by the master.

Swisher v. Brady, 438 U.S. 204, 211 fn. 9, 213 fn. 11 (1976).

Additionally, the Court has clarified that a putative class representative whose request for class certification is denied while he or she still has a live claim that expires thereafter, retains a personal stake in appellate review of the procedural question of class certification. *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 404 fn. 11 (1980).

By contrast, in a suit for injunctive relief with respect to publication rules for a student newspaper, where a class of high school students was certified without proper attention to detail, the Court held that the ineffective class certification was not enough to save the claim from mootness where the named plaintiffs graduated. *Board of School Com'rs of City of Indianapolis v. Jacobs*, 420 U.S. 128, 129 (1975). *See also, Weinstein v. Bradford,* 423 U.S. 147 (1975) (Dismissing as moot inmate challenge to parole procedures where district court declined to certify class and inmate was fully paroled prior to completion of appeal.)

Eroding the case or controversy requirement, as the Seventh Circuit decision does, moves further along the path to the use of the federal courts for "concerned bystander" and "client-less" litigation warned of in dissent by Justice Powell. *U.S. Parole Commission v. Geraghty*, 445 U.S. at 412-413 (joined in dissent by Justices Burger, Rehnquist, and Stewart); *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 353 (1980). In the present case, the Seventh Circuit forgives Mr. Olson the lack of his personal stake with respect to alleged practices at the Tippecanoe County Jail without regard to the fact that, generically, such claims will last, on average, 139 days and, in a non-trivial number of cases, in

excess of a year. These are time frames which permit a district court to rule on class certification, particularly if properly notified about the urgency for such a ruling.

The Seventh Circuit's rationale for deeming Mr. Olson's lack of a personal stake inconsequential to exercise of federal jurisdiction is that there are others like him and none of them can be certain when their particular claim will expire. *Olson v. Brown*, 594 F.3d at 582-583 (App. 10-11) ("An individual incarcerated in a county jail may be released for a number of reasons that he cannot anticipate. . . . This uncertainty is precisely what makes the 'inherently transitory' exception applicable in this case.") The Seventh Circuit errs by analyzing a particular individual's claim instead of the claim generally. Here, given the average duration of the claims in question and that many claims last in excess of a year, it is reasonably possible for a claim to endure at least through class certification even if it might be difficult at the outset to know whose particular claim will last the longest. An exception requiring only that the duration of a claim be uncertain at the outset and the existence of other people with similar claims swallows the rule.

Inmates are not a special case. They may face uncertainty about the future, but they are hardly the only ones. Furthermore, the broadening of the exception is unnecessary to accomplish its goals. The "capable of repetition but evading review" line of exceptions to the mootness doctrine is, as the name suggests, designed to allow courts to address claims of a type that would otherwise evade review because of their perishable nature. *Sosna v. Iowa*, 419 U.S. at 402. A pretrial detention probable cause determination is the classic example. Such detention has a

very real effect on people, but, in cases like *Gerstein* and *County of Riverside*, the claims did not last much more than thirty days and, therefore, absent an exception, there was a very real possibility that a federal court would never be able to address unconstitutional practices in that area, no matter how many detainees tried to bring a claim, because the inherent nature of the claim was so perishable.

By contrast, there is no real danger that the conditions of confinement at the Tippecanoe County Jail would escape review if Mr. Olson's suit is not allowed to proceed. If a representative cross-section of inmates were to bring suit and request class certification, it is not likely that all of their claims would expire before a district court could reasonably be expected to rule on a motion for class certification. At the point the district court dismissed his claim, Mr. Olson was merely a concerned citizen with respect to conditions at the Tippecanoe County Jail. A favorable ruling would not have provided him with any relief. In fact, if the conditions about which he complained were resolved independently of the litigation, he would not have any reason to know or, particularly, to care. His interests now are as a bystander, removed from the ongoing reality of the actual conditions at the Tippecanoe County Jail. As to Mr. Olson, this case is an abstract dispute about the law, unlikely to affect him any more than it affects other citizens. A dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words "Cases" and "Controversies." *Alvarez v. Smith*, 130 S.Ct. at 580-581.

III. The Seventh Circuit's ruling deepens a split in the circuits. The Second, Third, Seventh, and Tenth Circuits would likely allow Mr. Olson's suit to proceed whereas the First, Fourth, Fifth, Eighth, and Ninth likely would not.

In the wake of *Sosna* and *Gerstein*, the circuits have implemented the inherently transitory exception to the mootness doctrine in conflicting ways. The Second, Third, and, to a lesser extent, Tenth Circuits have recognized approaches that would permit Mr. Olson's claim to go forward. By contrast, the First, Fifth, Eighth and, to a lesser extent, the Fourth, and Ninth Circuits have recognized approaches that likely would not permit Mr. Olson's claim to go forward in those jurisdictions.

A. Jurisdictions consistent with the Seventh Circuit decision

The Seventh Circuit explicitly adopted the expansive approach taken by the Second Circuit in *Zurak v. Reagan*, 550 F.2d 86 (2d Cir. 1977). In *Zurak,* suit was brought on behalf of a class of Riker's Island inmates in New York serving "definite" sentences which were between 90 days and one year. Under New York law, such inmates were permitted to request conditional release after serving 60 days. The subject of their claim was the chaotic procedures associated with a conditional release determination. The class certification motion was unopposed, but for reasons not reflected in the record, the district court waited almost a year to certify the class. By that time, all of the named plaintiffs had been released. The Second Circuit reasoned that mootness was not a problem because the short periods

of incarceration and the possibility of conditional release created a "significant possibility" that any single named plaintiff would be released prior to certification. "Because of the relatively short periods of incarceration involved and the possibility of conditional release, the alleged harm can hardly be redressed while any possible plaintiff is still an inmate." *Id.* at 91-92. The Second Circuit went on to regard as "inherently transitory" claims of racial discrimination and segregation by applicants for federal housing assistance in Erie County, New York. *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) because the nature of the population of a public housing market is transitory "in some sense" but, especially because the district court failed to rule on a motion for class certification for over two years. *Id.* at 799.

The Third Circuit has also taken an expansive view of the exceptions to the mootness doctrine in proposed class actions, going so far as to state "So long as a class representative has a live claim at the time he moves for class certification, neither a pending motion nor a certified class action need be dismissed if his individual claim subsequently becomes moot." *Holmes v. Pension Plan of Bethlehem Steel Corporation*, 213 F.3d 124, 135 (3d Cir. 2000). However, the Third Circuit has recognized that its approach is not universal and that other circuits have not recognized the mere filing of a motion for class certification as allaying mootness concerns when the motion is pending at the time the named plaintiff loses his or her personal stake in the litigation. *Lusardi v. Xerox Corporation*, 975 F.2d 964, 977 fn 19 (3d Cir. 1992); *Rosetti v. Shalala*, 12 F.3d 1216, 1224-1228 (3d Cir. 1993); *Wilkerson v. Bowen*, 828 F.2d 117, 121 (3d Cir. 1987).

The Tenth Circuit has also taken a position that is somewhat consistent with that of the Second, Third, and Seventh Circuits. Mootness did not bar a proposed class action challenging conditions of detention at a boy's school where the named plaintiffs were removed for their safety shortly after the case was filed and before a class was certified. The Tenth Circuit acknowledged that the district court could not have reasonably been expected to rule on a motion for class certification prior to the boys' removal and, therefore, the exception to mootness noted in *Gerstein* and *Geraghty* were applicable. The court did not examine the nature of the claim generally to determine whether it was of a type that would likely expire for any named plaintiff. That notwithstanding, however, the Tenth Circuit also recognized that the boys had not lost their personal stake at all since the removal of the boys from the school was temporary and they were subject to being returned to the conditions about which they complained. *Milonas v. Williams*, 691 F.2d 931, 937-938 (10th Cir. 1982).

B. Jurisdictions inconsistent with the Seventh Circuit decision

On the opposite side of the divide, the First Circuit has decided that *Gerstein* and its progeny require it to look at the nature of a claim generally and not necessarily the specific circumstances of a named plaintiff's particular case, to determine whether an "inherently transitory" exception is justified. The First Circuit dismissed a claim by plaintiffs challenging the inaction of the Immigration and Naturalization Service in processing claims as moot. Within seventy days of the proposed class complaint, the INS had processed the plaintiffs' applications and given them

favorable determinations. The district court denied the motion for class certification and dismissed the claim as moot. Affirming the district court, the First Circuit observed that "the plaintiffs have not shown at this juncture that the generic types of claims that they seek to pursue are likely to evade review. To do so would necessitate a showing that the claims are inherently transitory." *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001). Rather than taking the position, as the Seventh Circuit has done, that Plaintiffs claims were transitory because they could not know at the outset when the INS would act on their particular applications; to avoid mootness, the Plaintiffs would have to show that the claims generally could not be expected to endure long enough for a district court to rule on a motion for class certification. *Id.* at 535-536.

Similarly, the Fifth Circuit dismissed a class claim by an inmate of a Louisiana state penitentiary concerning sanitary conditions for inmates performing field work. About five months after the inmate filed a suit for injunctive relief on behalf of himself and those similarly situated, he was removed from the fields by prison officials following an eye surgery. This removal was initially temporary but was eventually made permanent. *Rocky v. King*, 900 F.2d 864, 865 (5th Cir. 1990). The district court declined to rule on whether the claim was moot, instead denying the inmate's motion for class certification and entering summary judgment on the merits. The Fifth Circuit, recognizing mootness as a threshold matter, reversed the district court's entry of summary judgment on the merits and remanded the case for dismissal as moot. The uncertainty of the duration of Rocky's particular claim did not cause the Fifth Circuit to regard class certification as relating back to the filing of the

complaint. Instead, the court noted the existence of a sufficient number of inmates who worked in the fields for periods long enough to enable a district court to rule on a motion for class certification. "Hundreds of inmates at Angola apparently work in the fields and could file a claim identical to that filed by Rocky. There is no indication that Angola officials will remove such inmates from field work before a district court rules on class certification in order to render that claim moot." *Id.* at 870-871. The Fifth Circuit regarded the situation at the penitentiary as self-regulating against an intentional mooting of claims by prison officials. Field worker inmates who objected to the conditions would simply file claims to get removed from field work. *Id.* at 871, fn. 6.

In a case with facts very similar to Mr. Olson's, the Eighth Circuit dismissed as moot the asserted class claims of two inmates challenging the conditions of confinement of sentenced offenders and pretrial detainees at a Nebraska County jail. *Inmates of Lincoln Intake and Detention Center v. Boosalis*, 705 F.2d 1021 (8th Cir. 1983). The named plaintiffs lost their respective personal stakes at various points prior to the district court's denial of class certification. Specifically, both were incarcerated at the county jail when the claim was filed. The convicted inmate was released prior to moving for class certification. The pretrial detainee was transferred out of the jail after moving for class certification but before the district court's ruling. *Id.* at 1023. The Eighth Circuit determined that the claim had become moot and did not qualify for an exception to application of the mootness doctrine, reasoning that *Gerstein* did not apply because, whereas *Gerstein* involved only pretrial detainees, the Lincoln Inmates case involved both convicted inmates and

pretrial detainees and the inmates had made no showing that, absent relation back of class certification, the claims would evade review. *Id.* at 1023-24, fn 2. The uncertainties faced by inmates at that county jail did not persuade the Eighth Circuit that the "inherently transitory" mootness exception applied.

In another case similar to the one at hand, the Ninth Circuit staked out something of a middle ground, holding that it was up to the district court, not the circuit court, to determine whether a claim was "inherently transitory" within the meaning of *Gerstein*. *Kirkland v. Wade*, 118 F.3d 667, 670 (9th Cir. 1997). *Kirkland* involved a proposed class action challenging the "chain gang" labor conditions at a county jail housing pretrial detainees and misdemeanants. The plaintiff filed a motion for class certification along with the complaint. However, the district court postponed ruling on class certification to consider the defendants' motion to dismiss. Shortly after postponing the ruling, the district court was informed that the plaintiff had been transferred out of the county jail. The Ninth Circuit held that the district court erred by postponing a class certification determination. On remand, the Ninth Circuit instructed the district court to consider whether Wade's claim was "inherently transitory." *Id.* "We note only that the claims have the potential for being 'inherently transitory'; whether the class claims are in fact 'inherently transitory' is ultimately a decision for the district court, and we do not in any way suggest what result that court should reach." *Id.* The average length of detention at the county jail was noted as an important detail for this analysis. In Mr. Olson's case, by contrast, the district court reviewed the average length of detention and concluded that the class claims Mr. Olson was attempting to bring were not

so transitory as to evade review. *Also see*, *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1116-1118 (9th Cir. 2003) (Analyzing *Gerstein* and *Geraghty* in the context of a non-class claim and finding significance in a brevity of detention such that "any individual detainee's claim would probably become moot before trial.")

Finally, without a great deal of discussion, the Fourth Circuit dismissed as moot the injunctive class claims of an inmate at the Halifax County Jail for a proposed class of county jail inmates incarcerated at the county jail for more than thirty days. *Clay v. Miller*, 626 F.2d 345 (4th Cir. 1980). Clay sought to represent a class of county inmates and challenge conditions at the jail related to exercise opportunities for inmates. He was released from jail in August of 1979. The district court entered summary judgment in favor of the Sheriff and denied Clay's motion for class certification in November of 1979. The Fourth Circuit relied on *Sosna v. Iowa* in dismissing the claims for injunctive relief because Clay had been released from the county jail and was, therefore, not a member of the class he sought to represent at the time district court denying his motion for class certification. *Id.* at 346-347.

Ultimately, Article III, §2 of the United States Constitution is the foundation of federal judicial authority. Exceptions to limitations on that authority should not be made lightly. This Court has set forth the conditions under which a litigant who no longer has a personal stake may, nevertheless, maintain a class action for injunctive relief. Those conditions require that the nature of the claim itself be so transitory as to create uncertainty as to whether such a claim could ever endure long enough for a district court to

rule on class certification. The Circuit Courts are fractured in how they have implemented the decisions of this Court concerning "inherently transitory" claims. The Seventh Circuit has gone beyond what this Court has permitted. With relatively uncomplicated facts and straight forward procedural setting, the present case is a good vehicle for clarifying the contours of the "inherently transitory" exception to mootness in class action cases and for resolving the conflict among the circuits as to the proper application of that exception.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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In the United States Court of Appeals
For the Seventh Circuit

No. 09-2728

JEFFERY MARK OLSON, on behalf of himself and a class of those similarly situated,
Plaintiff-Appellant,

v.

TRACY BROWN, in his official capacity as Sheriff of Tippecanoe County,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 4:09-CV-00006—**Allen Sharp,** *Judge.*

ARGUED NOVEMBER 10, 2009
DECIDED FEBRUARY 4, 2010

Before POSNER and FLAUM, *Circuit Judges,* and DERYEGHIAYAN, *District Judge.*[*]

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[*] Hon. Samuel Der-Yeghiayan, District Judge for the Northern District of Illinois, is sitting by designation.

FLAUM, Circuit Judge.

A putative class of plaintiffs, represented by Mark Olson, filed a complaint against the Sheriff of Tippecanoe County, Tracy Brown, alleging several First Amendment violations and violations of Indiana law in the Tippecanoe County Jail. Olson filed for class certification at the same time he filed the complaint. Shortly after Olson filed the complaint and motion for class certification, the Indiana Department of Correction transferred him out of Tippecanoe County Jail. Because the transfer took place before class certification, the district court dismissed the suit as moot. Olson appeals the dismissal on the ground that this case is inherently transitory for any possible named plaintiff and therefore falls within the exception to the mootness doctrine announced in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). We find that this case fits within the exception to the mootness doctrine carved out for inherently transitory cases and therefore we reverse the district court's dismissal.

I. Background

Tippecanoe County Jail ("TCJ") is a temporary detention center that houses inmates awaiting trial, release on bail, or transfer to the Indiana Department of Correction, or serving sentences of less that one year. The parties stipulate that the following statistics regarding the inmate population as of February 20, 2009 represent a typical portrait of the inmate population at any given time: TCJ housed 529 inmates; 128 inmates had been incarcerated for less than 30 days; 119 inmates had been incarcerated

between 30 and 90 days; 130 inmates had been incarcerated between 90 and 180 days; 121 inmates had been incarcerated between 180 and 365 days; 41 inmates had been incarcerated for more than 365 days; and the average length of stay for the 529 inmates was 139 days. Coincidentally, Olson was incarcerated at TCJ for exactly 139 days-from August 29, 2008 through January 15, 2009.

TCJ employs a grievance policy to address inmate concerns. Once an inmate files a grievance, the jail is responsible for responding to the grievance within seven days. If the inmate does not agree with the decision, he or she may appeal. The jail then has fifteen days to respond to the appeal. While incarcerated at TCJ, Olson filed twenty-one grievances and twenty-one grievance appeals. The jail never responded to any of them. Olson maintained a journal recounting the precise language of each grievance and each grievance appeal. Olson's grievances included two grievances regarding jail staff opening his legal mail outside of his presence, one regarding a denial of access to the law library, and one regarding the jail's failure to respond to grievances.

On January 2, 2009, while incarcerated at TCJ, Olson filed this complaint and a motion for class certification. Olson's complaint set forth claims for injunctive relief against the Sheriff of Tippecanoe County with respect to four basic conditions of his confinement: (1) an inadequate grievance procedure, in violation of Indiana law; (2) inadequate access to the law library, in violation of Indiana law; (3) inspection of mail from the courts outside of his presence, in violation of the First and Fourteenth Amendments of the United States Constitution and Indiana

law; and (4) inspection of mail from attorneys outside his presence, in violation of the First and Fourteenth Amendments of the United States Constitution and Indiana law. With the motion for class certification, Olson included affidavits of fifty-three inmates detailing their experiences with jail staff opening their legal mail outside of their presence, denying them access to the law library, and failing to respond to their grievances. Thirteen days after Olson filed this complaint and his motion for class certification, the Indiana Department of Correction transferred Olson to a new facility.

Brown removed this cause of action to federal court on January 20, 2009. On February 2, 2009, Brown filed his answer to the complaint. On March 13, 2009, Brown filed his Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. The district court heard oral argument on Olson's Motion for Class Certification on March 18, 2009, but reserved its ruling on the class certification issue pending a ruling on Brown's Motion for Judgment on the Pleadings. On June 23, 2009, 171 days after the initial filing of this cause of action, the district court granted Brown's motion for Judgment on the Pleadings holding that Olson's transfer away from TCJ rendered this cause of action moot.

This appeal follows.

II. Discussion

Whether a case is moot is a question of law which we review de novo. *Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 771 (7th Cir.2002). A case is moot when "the issues

presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980).

It is without question that this case would be moot if Olson had brought his claims individually. Olson only sought injunctive relief and is no longer subject to the conditions that formed the basis of his complaint. Therefore, the controversy is resolved in relation to Olson. However, Olson filed for class certification while he was a party to a live controversy. This fact would generally not save a cause of action from becoming moot upon the termination of the named plaintiff's claims prior to the certification of the class. However, timely filing for class certification can save a cause of action if it falls within the exception to the mootness doctrine announced in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). The issue before this court is whether Olson's claim is so "inherently transitory" that it is uncertain that any member of the class would maintain a live controversy long enough for a judge to certify a class. If so, then this case is not moot for the purpose of class certification.

In *Gerstein*, the Court addressed the issue of class certification for Florida prisoners seeking a declaratory judgment that they had a constitutional right to a probable cause hearing for pretrial detention. Before reaching the substantive issues, the Court addressed whether it had jurisdiction to hear the claim. Faced with a situation where it was likely that none of the named plaintiffs had a live claim at the time of the class certification decision, the *Gerstein* Court specifically addressed the problem of mootness for

class claims brought by pre-trial detainees. The Court found that the case was not moot, reasoning:

> At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under *Sosna*. But this case is a suitable exception to that requirement. The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in this case.

420 U.S. at 111, n. 11, 95 S.Ct. 854 (internal citations omitted). A number of subsequent Supreme Court cases have reiterated and clarified the exception to the mootness doctrine announced in Gerstein. See, e.g., *Swisher v. Brady*,

438 U.S. 204, 98 S.Ct. 2699, 57 L.Ed.2d 705 (1978); *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). In *Swisher*, the Court affirmed a district court's decision to certify a class of juveniles involved in the juvenile court system despite the fact that the named plaintiffs claims were moot at the time of the decision. The Court in *Swisher* relied on *Gerstein's* predecessor, *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), to find:

> There may be cases in which the controversy involving the named plaintiff is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether certification can be said to "relate back" to the filing of the complaint may depend on upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Swisher, 438 U.S. at 213, n. 11, 98 S.Ct. 2699. In *McLaughlin*, the Court relied on the "inherently transitory" exception to find, "that the class was not certified until after the named plaintiffs' claims had become moot does not deprive [the Court] of jurisdiction," in a case challenging the denial of a prompt probable cause hearing for inmates in the county jail. 500 U.S. at 52, 111 S.Ct. 1661.

Although we have yet to apply the *Gerstein* line of cases to a case involving jail inmates in this circuit, the Second Circuit directly addressed this issue in *Zurak v.*

Regan, 550 F.2d 86 (2d Cir.1977). In *Zurak*, a class of inmates at Rikers Island filed suit against the New York State Board of Parole alleging a violation of their due process rights regarding their conditional release. 550 F.2d at 90. All of the class members were serving a sentence of ninety-days or more. *Id.* At the time the district court certified the class, all of the named plaintiffs had already been released from Rikers Island. *Id.* The defendants appealed the district court's ultimate decision on the merits by arguing that the case was moot at the time of class certification and therefore the district court acted without proper jurisdiction. *Id.* However, the Second Circuit found that this case was not moot at the time of class certification because it fit squarely within the exception carved out by Gerstein. *Id.* The court reasoned that the exception for inherently transitory claims applied in this situation because, "the relatively short periods of incarceration involved and the possibility of conditional release [created] a significant possibility that any single named plaintiff would be released prior to certification, although this possibility was less substantial than it was in *Gerstein*. As in *Gerstein*, however, the constant existence of a class of persons suffering the alleged deprivation is certain and the court may safely assume that counsel has other clients with a continuing live interest in the issues." *Id.* at 91-92 (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)).

We agree with the Second Circuit's determination that the Gerstein line of cases require a claim to meet two main elements for the "inherently transitory" exception to apply: (1) it is uncertain that a claim will remain live for any individual who could be named as a plaintiff long enough for a court to certify the class; and (2) there will be a constant

class of persons suffering the deprivation complained of in the complaint. *Gerstein*, 420 U.S. at 110 n. 11, 95 S.Ct. 854; *Zurak*, 550 F.2d at 91-92. Olson's claim meets both requirements.

First, based on the stipulated facts, it is uncertain that any potential named plaintiff in the class of inmates would have a live claim long enough for a district court to certify a class. As *Gerstein* and *Zurak* both explicitly point out, the length of incarceration in a county jail generally cannot be determined at the outset and is subject to a number of unpredictable factors, thereby making it inherently transitory. While the ultimate length of confinement does affect the applicability of the "inherently transitory" exception, the essence of the exception is uncertainty about whether a claim will remain alive for any given plaintiff long enough for a district court to certify the class. In *Banks v. NCAA*, 977 F.2d 1081, 1086 (7th Cir.1992) and *Trotter v. Klincar*, 748 F.2d 1177 (7th Cir.1984), we specifically addressed the fact that the crux of the "inherently transitory" exception is the uncertainty about the length of time a claim will remain alive. In both cases we found that the "inherently transitory" exception did not apply because in both cases the named plaintiffs knew, from the outset, exactly how long their claims would remain alive but chose to wait to file for class certification until the claim was nearly moot or already moot. In Banks, the plaintiff knew from the outset that his claim would become moot 120 days from the onset of the controversy, but he purposefully chose to wait 112 days before filing his complaint. 977 F.2d at 1086. We relied on this intentional delay in filing to find that the plaintiff was precluded from benefitting from the "inherently transitory" exception to the mootness doctrine. *Id.* ("Had Banks been

diligent in filing his claim shortly after discovering that he had failed to be selected for the draft or as a free agent, and still been unable to obtain class certification, he might have been able to make an argument for the class that he had standing for the purpose of pursing a ruling on class certification even though his own individual claim had become moot."). In *Trotter*, the named plaintiff had a live claim for seventy days but never filed for class certification. The plaintiff still attempted to rely on the "inherently transitory" exception for class actions when the court ruled that his case was moot. 748 F.2d at 1184-85. Similar to our reasoning in Banks, we found that the "inherently transitory" exception was inapplicable in *Trotter* because the plaintiff knew that his cause of action would soon become moot but chose not to file for class certification.

Brown attempts to read *Banks* and *Trotter* to create a bright-line rule that we cannot apply the "inherently transitory" exception to a claim that has been alive beyond a given number of days. Brown argues that the "inherently transitory" exception should not apply here because Olson's delay in filing this suit is the same as the one hundred and twenty day delay in Banks and the seventy-day delay in *Trotter*. This analogy is misguided in two respects. First, no such bright-line rule exists. Unlike the plaintiffs in *Banks* and *Trotter*, Olson did not know when his claim would become moot. The duration of his claim was at the discretion of the Indiana Department of Correction. An individual incarcerated in a county jail may be released for a number of reasons that he cannot anticipate. Olson's transfer by the Indiana Department of Correction just thirteen days after he filed for class certification in this suit illustrates one such unpredictable occurrence that could unexpectedly moot a

claim for a county jail inmate. This uncertainty is precisely what makes the "inherently transitory" exception applicable in this case. Second, because Olson was required to exhaust his administrative remedies before filing this suit, the period of time between the first possible day he could file and the day he actually filed was only fifty-two days-a significantly shorter period of time than was at issue in *Banks* or *Trotter*.

The case at bar also meets the second requirement for the inherently transitory exception-there will be a constant class of persons suffering the deprivation. Contrary to Brown's argument, the "inherently transitory" exception to the mootness doctrine is distinct from the "capable of repetition yet evading review" exception. When the claim is inherently transitory, as it was in *Gerstein* and as it is in this case, the plaintiff must show that there will likely be a constant class of persons suffering the deprivation complained of in the complaint. This is different from when a plaintiff invokes the "capable of repetition yet evading review" exception, where the plaintiff must show that the claim is capable of repetition as to the named plaintiff. A close reading of *United States Parole Commission v. Geraghty*, 445 U.S. 388, 398-99, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980), makes this distinction clear. In *Geraghty*, the Court first acknowledged that a plaintiff must have a reasonable expectation of being subjected to the offending behavior in the future to avail himself of the "capable of repetition yet evading review" exception to the mootness doctrine. However, the Court then turned to *Gerstein* and found that the "inherently transitory" exception does not require any indication that the named plaintiff would be subject to the complained-of situation in the future but just that the claim is capable of repetition. *Geraghty*, 445 U.S. at 398-99, 100

S.Ct. 1202. Our own precedent also supports this distinction. In *Banks*, we treated "inherently transitory" and "capable of repetition yet evading review" as two separate lines of argument by the plaintiff for why the case was not moot. 977 F.2d at 1085-86.

Because Olson asks this court to apply the "inherently transitory" exception, not the "capable of repetition yet evading review" exception, the Supreme Court's recent holding in *Alvarez v. Smith*, 588 U.S. ----, 130 S.Ct. 576, --- L.Ed.2d ---- (2009), is not applicable to this case. In *Alvarez*, the Court held that the plaintiffs could not rely on the "capable of repetition yet evading review" principle to avoid mootness because they could not show that they were likely to be subjected to the complained-of state procedures again. *Alvarez*, at 581-83. As discussed above, the "inherently transitory" exception does not require such a showing. Additionally, the district court in Alvarez denied the plaintiffs' motion for class certification. The plaintiffs never appealed that decision. Significantly, this case is in a different procedural posture. Here, Olson seeks to keep the claim alive beyond his individual claim to certify the class. If the district court certifies the class, the case can proceed to the merits for the certified class of plaintiffs. The *Alvarez* plaintiffs, through their inaction in response to the denial of class certification, conceded that their claims should not extend beyond the life of their individual claims. The difference in procedural postures of the two cases makes *Alvarez* inapplicable to the case at hand.

Since we find that the claim "is of the kind that is unlikely to be able to certified before it becomes moot," and thereby meets the first requirement of *Gerstein*, all Olson

must show is that the claim is likely to recur with regard to the class, not that the claim is likely to recur with regard to him. The pervasive nature of these claims, as evidenced by the fifty-three affidavits outlining problems similar to those complained of by Olsen, makes it likely that TCJ's alleged practices of opening inmates' legal mail, denying inmates access to the law library, and failing to respond to inmates' grievances will continue. Therefore, this case meets the second requirement of the inherently transitory exception.

As a final argument, Brown urges us to affirm the dismissal of the suit on the ground that it fails to state a claim for which relief may be sought. However, the district court did not reach this issue before dismissing the case for lack of jurisdiction. Therefore, we do not reach the issue of whether the pleadings state a claim for which relief may be sought.

Additionally, Olson asks that we address the issue of class certification. We decline this invitation. A district court has broad discretion to determine whether certification of a class action lawsuit is appropriate. *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 474 (7th Cir.1997). Therefore, we remand to the district court to determine whether class certification is appropriate in this case.

III. Conclusion

For the above stated reasons, we REVERSE the district court's dismissal of the complaint as moot. We REMAND for consideration of the plaintiff's motion for class certification and defendant's motion for dismissal for failure to state a claim.

NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

JEFFREY MARK OLSON, on his own behalf and on of a class of those similarly situated, Plaintiffs,	)	
v.	)	No. 4:09-cv-00006
TRACY BROWN, in his official capacity as Sheriff of Tippecanoe County, Defendant,	)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Motion for Judgment on the Pleadings (Doc. No. 19) filed by Defendant Tracy Brown ("Sheriff Brown") on March 13, 2009, pursuant to the Federal Rules of Civil Procedure, Rule 12(c), against Plaintiff Jeffrey Mark Olson ("Mr. Olson" or "Plaintiff") who is suing on his own behalf and on behalf of a class of those similarly situated.

On March 18, 2009, the Court heard oral argument in South Bend on the pending Motion for Class Certification under Fed. R. Civ. Pro. 23(a) and (b)(2) (Doc. No. 2). At the time of the hearing, the Motion for Judgment on the Pleadings filed on March 13, 2009 (Doc. No. 19) was not yet ripe. The parties were informed that a ruling on the latter motion (once ripe) would precede consideration of the class certification, and no objection was made. Because the issues raised in both motions overlap, the Court considers the arguments made in the briefs for both motions, and the

arguments made during the March 18 hearing, to the extent that they are relevant here. For the reasons that follow, Sheriff Brown's Motion for Judgment on the Pleadings is GRANTED.

I. Procedural and Factual Background

On January 2, 2009, Mr. Olson filed a "class action complaint for declaratory and injunctive relief" to enjoin the practices of the Tippecanoe County Jail. Mr. Olson sues on his behalf and on the behalf of "any and all persons currently confined, or who will in the future be confined, in the Tippecanoe County Jail." Class Action Complaint, ¶ 6. On January 20, 2009, Sheriff Brown removed the case from Tippecanoe County State Court to this Court based upon federal question jurisdiction.

By way of background, Mr. Olson was sentenced on or about November 1, 2003, to ten years in the Indiana Department of Corrections. While pending transfer to a different facility, he was held at the Tippecanoe County Jail ("the Jail") beginning on August 29, 2008. While at the Jail, numerous violations of law against him allegedly occurred primarily in September and October 2008, including the following claims:

> (1) improper handling of legal mail, which was opened outside the presence of the addressee/inmate;
> (2) providing unreasonable access to the law library;
> (3) improper handling/delayed response (or no response) to inmate grievances;

> (4) providing incorrect prescription medications to inmates;
> (5) providing dirty eating utensils and cups to inmates who are without a means to sanitize their own utensils;
> (6) providing a law library that is out-of-date;
> (7) charging excessive charges for medical visits and medications; and,
> (8) charging excessive commissary prices, including excessive prices for pre-paid phone cards.

See Class Action Complaint, pp. 3-11. On November 7, 2008, Mr. Olson filed a final grievance with the Jail stating:

> On October 25, 2008, I submitted a grievance due to jail personnel not responding to any prior grievance. Again, personnel have ignored my grievance and failed to reply. Please reply to my 10-25-08 grievance. If you fail, I will not file any more grievances, I will proceed to the United States District Court. Please accept this as my appeal of my October 25, 2008, grievance.

See Doc. No. 1-2, Class Action Complaint, p. 8. Almost 2 months later, on January 2, 2009, Plaintiff filed his Class Action Complaint and a Motion for Class Certification while he was incarcerated in the Jail. On January 15, 2009, after being incarcerated at the Jail for over 4 months (approximately 139 days), yet only 2 weeks after filing the Class Action Complaint, Mr. Olson was transferred from the Jail directly to the Indiana Department of Correction. *See*

Doc. No. 16-2, Olson Affidavit, ¶ 1.

The average length of stay of inmates in the Jail during the relevant time frame is 139 days. Of those inmates incarcerated in the Jail on February 20, 2009, 128 inmates were incarcerated in the Jail for less than 30 days; 119 were incarcerated in the Jail for between 30 and 90 days; 130 were incarcerated in the Jail for between 90 and 180 days; 121 were incarcerated in the Jail for between 180 and 365 days; and 41 were incarcerated in the Jail for more than 365 days.

Defendant Sheriff Brown argues that judgment under Rule 12(c) is proper because:

(1) the Plaintiff has no private right of action to enforce jail standards set forth in 210 Ind. Admin. Code 3-1-15 (concerning jail law libraries and grievance procedures) and set forth in 210 Ind. Admin. Code 3-1-16 (concerning handling of inmate mail from attorneys and the courts) because these standards are enforced by the Indiana Department of Corrections;

(2) there is no constitutional privilege with respect to mail coming from the courts since they are public documents and implicate no privacy right; and, mail from attorneys where no attorney-client privilege has been claimed is not constitutionally protected; and/or

(3) Mr. Olson's claims for injunctive relief are moot because he is no longer incarcerated at the Tippecanoe County Jail, and was transferred to the Indiana Department of Corrections on January 15, 2009.

II. Standard of Review

Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial." A Rule 12(c) motion for judgment on the pleadings is reviewed "under the same standards as a motion to dismiss under 12(b). *Flenner v. Sheahan*, 107 F.3d 459, 461 (7th Cir.1997); *see also Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868, ---- (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-70, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face.")); *Limestone Development Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 803 (7th Cir.2008) (reasoning that a complaint must allege facts to state a claim to relief that is plausible on its face) (citing *Bell Atl. Corp.*, 550 U.S. at 544). A motion for judgment on the pleadings is properly granted where, accepting all "well-pleaded allegations in the complaint as true" and drawing all "reasonable inferences in favor of the plaintiff," the moving party is entitled to judgment as a matter of law. *Forseth v. Vill. of Sussex*, 199 F.3d 363, 368 (7th Cir.2000).

For purposes of Rule 12(c), pleadings include the complaint, the answer, and any written instruments attached as exhibits. See Fed.R.Civ.P. 10(c); *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452-53 (7th Cir.1998) (concluding that the broader interpretation of "written instrument" comports with the generous nature in which we view pleadings, and therefore "written instrument," as used in Rule 10(c), includes

documents such as affidavits) (citing *Schnell v. City of Chicago*, 407 F.2d 1084, 1085 (7th Cir.1969), overruled on other grounds by *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973)). *But see Rose v. Bartle*, 871 F.2d 331, 339-40 n. 3 (3d Cir.1989) (concluding that affidavits are not written instruments). Rule 10(c) provides that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." *McCready v. eBay, Inc.*, 453 F.3d 882, 891 (7th Cir.2006). From this rule, the Seventh Circuit has concluded "documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim." Id. (citations omitted). Based on the generous nature in which pleadings are viewed, the Court considers for purposes of this ruling, the stipulation (Doc. No. 18) and affidavits submitted by Plaintiff and similarly situated inmates attesting to the alleged violations of their rights, because these documents are part of the pleadings where they form the basis of the Complaint and are central to the claims made therein.

III. Discussion

The Court begins its analysis where it will soon end-on the issue of whether Mr. Olson's claims are moot, and the effect thereof.[1] Mr. Olson admits that he is no longer

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[1] Mr. Olson's standing to initially sue is uncontested. Mr. Olson satisfied each of the Article III requirements for standing to sue by alleging an actual "injury in fact" that is concrete and particularized and is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable decision. *Arreola v. Godinez*, 546 F.3d 788, 794-95 (7th Cir.2008) (stating that "it is best to confine the term

an inmate at the Tippecanoe County Jail, but relies on the relation-back doctrine discussed in *Gerstein v. Pugh*, 420 U.S. 103, 111 n. 11, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), for his position that the class action survives and is not rendered moot, because he filed the Complaint and requested class certification prior to his transfer from the Jail. See Doc. Nos. 12, 28. While Mr. Olson is correct that inherently transitory claims may avoid dismissal as a result of mootness, *see infra*, he is incorrect in classifying his case as one that meets an exception to the mootness doctrine.

Because Mr. Olson filed his Complaint while he was in the Jail, this case is not moot on arrival. *See e.g., Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir.1994) (noting that the named plaintiff, who did not move for class certification prior to the expiration of his individual claims, "cannot avail himself of the class action exception to the mootness doctrine."); *Holmes v. Fisher*, 854 F.2d 229, 232 (7th Cir.1988) (finding that the case was "dead on arrival, moot the day the complaint was filed ... there was never a case or controversy within the meaning of Art. III of the Constitution" because the plaintiff did not file his suit until after he was arrested and after he received the hearing which he contended arrested persons were entitled). Instead, Mr. Olson's case became moot upon his transfer from the Jail on January 15, 2009- after he filed the

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'standing' to the Article III inquiry and thus to keep it separate from the plaintiff's entitlement to relief or [the plaintiff's] ability to satisfy the Rule 23 criteria.") (citing *Payton v. County of Kane*, 308 F.3d 673, 676 (7th Cir.2002)). Mr. Olson had standing when he filed the Complaint seeking injunctive relief where he was incarcerated in the Jail experiencing the alleged unlawful actions of the defendant.

Complaint and request for certification on January 2, 2009, but before the class could be certified.

Under *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) and *United States Parole Commission v. Geraghty*, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980), the mootness of a plaintiff's personal claim did not prevent him from serving as the representative of a class. In *Sosna*, however, the class was certified before the representative's case became moot, and the Court reasoned that after certification the class itself was the plaintiff. *Geraghty*, which was specifically limited to the appeal of the denial of the class action motion, held that when the district court denies the plaintiff's motion to certify a class, and the plaintiff appeals from the denial, if his appeal is pending when his substantive claim evaporates, then the appeal is not moot. *See also Weismueller v. Kosobucki*, 513 F.3d 784, 786 (7th Cir.2008) (citing *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 335-37, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980); *Geraghty*, 445 U.S. at 404)). This is so "because unless and until the appellate court affirms the denial of the motion to certify a class, there may be people other than the plaintiff with a legally protected interest in the suit-namely the unnamed members of the class." *Weismueller*, 513 F.3d at 786.

While Mr. Olson did move for class certification prior to the evaporation of his personal stake, he cannot claim the benefit of this exception to the mootness doctrine because this Court did not certify the class in the short time between the filing of his Complaint and request for class certification, and his subsequent transfer from the Jail-a mere thirteen days. The requirement that Mr. Olson's case be dismissed

under these circumstances has been made clear by the Seventh Circuit Court of Appeals. *Weismueller*, 513 F.3d at 786 ("If on the other hand, the named plaintiff's claim becomes moot before the class is certified, the suit must be dismissed because no one besides the plaintiff has a legally protected interest in the litigation.") (citing *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 130, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975) (per curiam) (holding that "Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded ... to vacate [the District Court's] judgment and to dismiss the complaint"); *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452, 456 (7th Cir.2007) (stating that "if the would-be representative's claim becomes moot before certification, then the case must be dismissed)).

However, as argued by Mr. Olson, he may avoid dismissal because of mootness, if he is able to demonstrate that his claim on the merits, while no longer live, is "capable of repetition, yet evading review." *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir.1994). To do so, Mr. Olson must prove that:

> 1) his claim is "so inherently transitory that the trial court [did] not have enough time to rule on a motion for class certification before the proposed representative's individual interest expire[d]," *County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) (citations omitted); and 2) he will again be subject to the alleged illegality, *City of Los Angeles v. Lyons*, 461

> U.S. 95, 110, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). *See Robinson v. City of Chicago*, 868 F.2d 959, 967 (7th Cir.1989).

Holstein, 29 F.3d at 1147; *see also Franks v. Bowman Transportation Company*, 424 U.S. 747, 756 n. 8, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) ("Thus, the 'capable of repetition, yet evading review' dimension of Sosna must be understood in the context of mootness as one of the policy rules often invoked by the Court 'to avoid passing prematurely on constitutional questions. Because (such) rules operate in 'cases confessedly within (the Court's) jurisdiction' ... they find their source in policy, rather than purely constitutional, considerations.") (citations omitted).

The United States Supreme Court has also held that when a class action is sought, the mooting of the plaintiff's individual claims for relief does not moot the case if, the plaintiff's individual claims are inherently transitory. In *Gerstein*, 420 U.S. at 103, the named plaintiffs filed a class action challenging pretrial detention conditions. The Court assumed that the named plaintiffs were no longer awaiting trial at the time the trial court certified the class of pretrial detainees. *Id.* at 111 n. 11. In addition, there was no indication that the named plaintiffs might again be subject to pretrial detention. *Id.* Nevertheless, the Court held that the case was not moot:

> This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. *See Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553,

> 42 L.Ed.2d 532 (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted ... This claim, in short, is one that is distinctly 'capable of repetition, yet evading review'... It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class ...

Gerstein, 420 U.S. at 111, n. 11.

Similarly, in *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), a class action was brought by arrestees challenging the manner in which the defendant county provided probable cause determinations to persons who had been arrested without a warrant. *Id.* at 47. At the time the suit was filed, the named plaintiffs were incarcerated. *Id.* at 51. However, by the time the class was certified, their individual claims were moot. *Id.* at 51-52. The Court found that the case itself was not moot and that the class was properly certified:

> That the case was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction. We recognized in *Gerstein* that "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest

> expires."... In such cases, the "relation back" doctrine is properly invoked to preserve the merits of the case for judicial resolution.

McLaughlin, 500 U.S. at 52.

Regarding the transitory nature of the claim, Mr. Olson was incarcerated for over four months, and filed his last Jail grievance on November 7 requesting a response to his October 25 grievance. Thereafter, Mr. Olson waited nearly 2 months (56 days) to file his class action complaint in federal court. There is no evidence that after not receiving grievance responses, Mr. Olson was kept from accessing the Court. Moreover, based on the average length of incarceration, Mr. Olson is among the approximate 54% of the inmate population that is incarcerated more than 90 days in the Jail. In fact, approximately 30% of the inmate population is incarcerated in the Jail for more than half a year. Further, Mr. Olson's situation is one unlike those cases where a court normally will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires, such as a challenge presented to pretrial detention, *see Gerstein*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54, or probable cause determinations for those recently arrested, *see McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49, or intake strip searches after arrests, *see May v. Frisbie*, 2009 WL 1148223 (S.D.Ind. Apr.28, 2009). Here, Mr. Olson, like over half the inmates in the Jail, was incarcerated for over 3 months. Based on these facts, this Court cannot say that Mr. Olson's claims are so inherently transitory that he can evade the mootness doctrine. *See Banks v. NCAA*, 977 F.2d 1081, 1086 (7th Cir.1992) (reasoning that had plaintiff filed his complaint

shortly after discovering the alleged conduct, and still been unable to obtain class certification, he might have been able to make an argument that the claim was transitory); *Trotter v. Lincar*, 748 F.2d 1177, 1184-85 (7th Cir.1984) (rejecting a claim that 70 days provided insufficient time to obtain a ruling on a motion for class certification).

Although this is enough to dismiss Mr. Olson's complaint, the Court also finds that it is not likely that Mr. Olson will be subject to the Jail's procedures in the future. *See Holmes v. Fisher*, 854 F.2d 229, 232 (7th Cir.1988) (finding that the "capable of repetition but evading review" doctrine applies only when repetition is likely to embroil the same parties to the dispute) (citations omitted). The mere physical or theoretical possibility of Mr. Olson being incarcerated at the Jail and suffering the alleged wrongful acts of the defendants is insufficient to satisfy this prong. *Holstein*, 29 F.3d at 1148 (citing *Jones v. Sullivan*, 938 F.2d 801, 806 (7th Cir.1991)). Instead, there must be a "reasonable expectation" or a "demonstrable probability" that the same controversy will recur involving the same parties. *Id.* (citing *Jones*, 938 F.2d at 807) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982)). Mr. Olson cannot make such a showing.

Mr. Olson's case cannot be classified as transitory or capable of repetition but evading review-certainly a given inmate at the Jail, named as plaintiff, could be, and in fact has been most recently, incarcerated long enough for a district judge to certify a class. *See Arreola v. Godinez*, 546 F.3d 788, 799 (7th Cir.2008) ("[W]e cannot conclude that it would be impossible for a more suitable representative of a Rule 23(b)(2) class to emerge. This also means that, contrary to

[the plaintiff's] arguments, this case is not a good candidate for application of the 'capable of repetition, yet evading review' concept.") (citation omitted). As a result, Mr. Olson's claim is moot.

IV. Conclusion

For the reasons stated herein, the Court GRANTS Defendant Sheriff Brown's Motion For Judgment on the Pleadings (Docket No. 19), as this case is deemed moot and is dismissed without prejudice. Each party to bear its own costs.

SO ORDERED.

DATED: June 22, 2009

/s/Allen Sharp
ALLEN SHARP, JUDGE
UNITED STATES DISTRICT COURT